



Must schools allow all recognized student clubs to meet on campus regardless of the club members' philosophy?

# Christian Legal Society v. Martinez: Regulating the Use of School Facilities

By Charles J. Russo, J.D., Ed.D., and William E. Thro, M.A., J.D.

In what may come to rank as one of its most significant cases on religious freedom, *Christian Legal Society v. Martinez* (2010), the Supreme Court affirmed an order of the Ninth Circuit upholding a policy at a public law school in California that required recognized student clubs to admit "all comers" even if they disagreed with organizational goals. However, since it was unclear whether university officials selectively applied the policy to the Christian Legal Society (CLS), the Court remanded the dispute for further consideration of this question.

The fact that CLS originated in the world of higher education notwithstanding, it raises far-reaching questions for school business officials and other education leaders in K-12 settings about access to facilities, as well as the rules governing clubs seeking to meet on campuses. As such, this column provides an overview of the Supreme Court's lengthy opinions before reflecting on potential ramifications for public schools.

As with most cases that reach the Supreme Court, the facts in CLS are straightforward. A dispute arose at Hastings College of the Law, part of the University of California system, over its policy governing official recognition of student groups. Recognized status at Hastings grants student groups access to school funds, facilities, and channels of communication or its name and logo. In return, groups must comply with Hastings's nondiscrimination policy that, consistent with state law, forbids discrimination on an array of criteria, including religion and sexual orientation. Hastings officials interpreted this policy as requiring recognized groups to accept all comers, meaning they must allow all students to join and seek leadership positions regardless of their status or beliefs.

At the start of the 2004-2005 academic year, the campus branch of CLS chose to affil-

iate with the national group and adopted bylaws that included the requirement that members and officers sign a statement of faith dictating that all members comply with its principles, such as the belief that sexual activity should not occur outside of marriage. CLS does not accept members who engage in "unrepentant homosexual conduct" or who have religious beliefs that are contrary to the statement of faith.

Hastings officials rejected CLS's application for recognized status because its bylaws differed from the school's all-comers policy by excluding students based on religion and sexual orientation. CLS was thus prohibited from meeting on campus or using school resources.

CLS unsuccessfully sought to enjoin enforcement of Hastings's policy, alleging that it violated the group's rights to speech, association, and religion. In refusing to enjoin the policy, a federal trial court in California, in an unreported opinion, decreed that the all-comers condition in the Hastings policy was reasonable and the viewpoint neutral. The court added that the policy did not impair CLS's right to expressive association and was acceptable because it did not require the group to admit members or limit speech. The court asserted that if anything, the policy merely placed conditions on the use of school facilities and funds. The court rejected CLS's free exercise claim in maintaining that the neutral, generally applicable policy did not single out religious beliefs for different treatment.

On appeal, the Ninth Circuit affirmed that the all-comers policy was reasonable and viewpoint neutral (CLS 2009a). Since the Ninth Circuit's ruling in CLS directly conflicted with a case from Indiana in which the Seventh Circuit reached the opposite result (*Christian Legal Society v. Walker* 2006), the Supreme Court agreed to hear an appeal.

## Supreme Court Analyses

A bitterly divided Supreme Court affirmed in a five-to-four judgment that the all-comers policy passed constitutional muster. Writing for the majority, Justice Ginsburg was joined by Justices Stevens, Kennedy, Breyer, and Sotomayor.

At the outset of its opinion, the majority noted its reluctance to deny student groups access to campus facilities based on their viewpoints. In acknowledging that it faced a novel question, the Supreme Court defined the issue before it as whether “a public law school [may] condition its official recognition of a student group—and the attendant use of school funds and facilities—on the organization’s agreement to open eligibility for membership and leadership to all students” (p. \*5).

After recounting the facts, in which it categorized access to facilities as a kind of subsidy, the majority began its analysis by combining CLS’s freedom of speech and association claims in light of the Court’s limited public forum jurisprudence. Insofar as the Supreme Court failed to provide sufficient detail, it is worth noting that in reviewing First Amendment claims, the justices identified three different types of forums. Under the first category, government power to regulate expression is most restricted in traditional public forums, such as parks, streets, and sidewalks (*Hazelwood School District v. Kuhlmeier* 1988), analysis that was inapplicable in CLS. Equally inapplicable was the non-public forum doctrine that typically applies in classrooms that are “not by tradition or designation a forum for public communication” (*Perry Education Association v. Perry Local Educators’ Association* 1983, p. 46).

Turning to the third category, the Supreme Court held that the appropriate standard was that of a “limited public forum,” property that the state, *qua* Hastings, opened for public use as a place for expressive activity. Public

institutions can create such a forum by express policy or by practice.

Following its review of cases in which the majority applied this analysis, the Court interpreted the all-comers policy as reasonable for two reasons. First, the justices were convinced that since they ordinarily granted deference to education leaders, officials had the authority to establish such a policy. Second, the Court was satisfied that the reasons officials provided for initiating the policy—such as affording leadership opportunities for students, forbidding discrimination based on status, and bringing individuals of all types together—were legitimate and nondiscriminatory.

## School board policies may require student organizations to admit all who wish to join, regardless of beliefs.

The Supreme Court indicated that based on the off-campus alternative channels that were available to CLS in light of the loss of its recognized status, the policy was all the more reasonable. The Court next rejected CLS’s concerns that if it had to comply with the policy there would be no diversity of perspectives on campus and that individuals who were hostile to it could infiltrate its ranks in order to subvert its mission. The majority retorted that since the policy did allow clubs to condition eligibility for membership and leadership positions on such qualifications as attendance at meetings, dues payment, and other neutral criteria, CLS’s concerns were unfounded.

Even in concluding that the all-comers policy was constitutional, the Supreme Court remanded CLS for further consideration. The justices observed that since the lower courts failed to address whether Hastings officials selectively enforced the all-comers policy, the Ninth Circuit had to consider the extent to which CLS’s arguments may have still been viable.

## Concurrences

Justices Stevens and Kennedy penned separate concurrences. Stevens, in the final case of his almost 35-year career on the Supreme Court, authored a brief opinion to rebut Justice Alito’s dissent, which posited that the policy was unconstitutional. Stevens responded that while CLS had the right to limit membership off campus, the First Amendment does not require Hastings’s policy to permit the same.

In an even briefer concurrence, Justice Kennedy pointed out that law school officials and CLS stipulated that there was no evidence of viewpoint discrimination in the policy. Even so, he explained that the result may have been different had CLS been able to prove that the all-comers policy was designed or employed to infiltrate its membership or to challenge its leadership in an attempt to stifle its perspective, an issue that may well arise on remand.

## Dissent

Justice Alito, joined by Chief Justice Roberts along with Justices Scalia and Thomas, dissented vociferously. At the outset of his lengthy dissent, Justice Alito voiced his concern that the Court imposed a significant restriction on religious freedom, especially in light of the fact that law school officials had not relied on the all-comers policy until CLS initiated its suit. Alito also thought that since the policy placed a substantial burden on the religious freedom of CLS’s members, but no other group in a limited open forum that was supposed to be viewpoint neutral, it unreasonably infringed on their rights.

## Implications for K-12 Education

CLS raises interesting implications for school business officials and other education leaders who are responsible for board funds and the use of district facilities. The following points review five related questions.

First and perhaps most obviously, school board policies may now

require student organizations to admit all who wish to join regardless of their beliefs. That is, while federal statutes such as the Equal Access Act (2009) and the First Amendment still require boards to recognize student religious groups, educators may require clubs to admit members who disagree with the core tenets of their philosophies.

In *CLS*, the Supreme Court essentially repudiated a case from New York in which the Second Circuit reasoned that clubs could set their own criteria for electing leaders. The Second Circuit also suggested that individuals who disagreed with club goals were free to form their own organizations (*Hsu v. Roslyn Union Free School District* 1996). Yet, *CLS* now extends the all-comers requirement to leadership positions.

The upshot of *CLS* is that atheists may end up leading Fellowship of Christian Athletes chapters while homophobes may seek to become presidents of gay-straight clubs. Open membership policies may remove some administrative headaches associated with student groups that wish to limit who can join, regardless of their bases for doing so, but may create other concerns, such as the fear voiced by *CLS* that outsiders may wish to infiltrate their membership and undermine the group.

Second, *CLS* extends school board powers to restrict access to limited public forums, such as auditoriums and stadiums. While boards, like all government entities, always had the authority to bar activities from their limited public forums, *CLS* allows officials to deny access to groups that condition membership on the basis of belief. Consequently, board officials may require outside groups that seek to rent halls for speeches and films to have open membership policies. Since such a rule excludes churches and political organizations, boards may avoid some of the difficult issues surrounding church and state as well as questions involving the use of public

facilities for partisan campaign activities by limiting access. However, in seeking to avoid one type of controversy, others may emerge since such an approach may galvanize taxpayers into protesting that they are denied access to publicly funded facilities.

### **CLS allows officials to deny access to groups that condition membership on the basis of belief.**

Third, because the Supreme Court characterized access to a limited public forum as a "subsidy" in *CLS*, it may be moving toward a different approach on the use of school facilities. Before the adoption of the Equal Access Act, boards had broad almost absolute authority to choose who could use their facilities or whether student groups would be recognized. Over the past three decades, the Court basically ruled that if boards allow some outside groups to use their facilities, then they must allow all outside groups to do so for similar purposes. While this is classic limited public forum jurisprudence, the subsidy question is fundamentally different since there is no right to a subsidy. In other words, if courts categorize access to school facilities as "subsidies," by allowing selected groups to use space at presumably discounted prices, then boards are likely to have broad authority to refuse access.

Fourth, since the Supreme Court continues to grant broad deference to the judgment of higher education officials about institutional needs and policies, one would expect similar deference in the K-12 context. This development may make it easier for school boards to prevail in litigation challenging the judgments of educational policy makers.

Fifth, while *CLS* seems to be a victory for school boards, it may ultimately undermine efforts to foster communities of inclusiveness and tolerance. As reflected by the growth in

home schooling and other alternative forms of education, some parents of faith distrust public schools based on their perception that their values are unwelcome. Requiring Christian groups to include non-Christians as a condition of using public facilities may reinforce this belief. Moreover, revising facility use policies so that churches and political groups may not use school property arguably sends a message of isolation that public officials may not wish to endorse.

### **Conclusion**

Since the Supreme Court remanded the dispute for further consideration of whether officials at Hastings singled out *CLS* with respect to enforcing their all-comers policy, the case may be far from over. Thus, this case bears further watching because it may have a significant impact on the way in which school business officials regulate the use of district facilities and deal with related costs.

### **References**

*Christian Legal Society v. Martinez*, 319 Fed.Appx. 645 (9th Cir. 2009a), *cert. granted*, 130 S. Ct. 795 (2009b), 130 S. Ct. 2971 (2010).

*Christian Legal Society v. Walker*, 453 F.3d 853 (7th Cir. 2006).

Equal Access Act, 20 U.S.C. §§ 4071 *et seq.* (2009).

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